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The European Court of Human Rights and the Sources of International Law

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Dear Colleagues, Ladies and Gentlemen,

I thank Mr Petr Válek for his invitation and his kind introduction. It is a pleasure to be back in beautiful Prague – but I am sorry that so many colleagues could not make it under the present difficult circumstances of COVID-19. I fondly remember my last visit to Prague in December 2018 at the invitation of Professor Pavel Šturma, my fellow Member and current Chair of the International Law Commission.

I. Introduction

The sources of international law concern age-old questions which have remained ever young. The modern debate about the sources of international law has started exactly one hundred years ago. In the summer of 1920, an Advisory Committee of Jurists successfully prepared a Draft Statute for the Permanent Court of International Justice.[1] One of the most controversial questions was which law the Court was authorised to apply. As is well-known, the Committee settled on three sources: treaties, customary international law, and general principles of law.[2] These sources were codified in Article 38 of the Statute of the Court.

The debate in 1920 on the applicable law was controversial because the members of the Advisory Committee disagreed about the role and the powers of the envisaged court. On one side were those, like Baron Descamps from Belgium, who maintained that if there was no specific treaty or customary rule the Court should decide according to "the legal conscience of civilized nations".[3] On the other side were members like Elihu Root from the United States who insisted that the Court must decide on the basis of clear rules of international law and that such rules could not be invented by judges.[4] The compromise which the Advisory Committee reached consisted in requiring that general principles of law be "*recognized* by civilized nations".[5] Thus, such principles could not simply result from the legal conscience of enlightened judges but they needed to be actually recognised in the domestic legal orders of "civilized nations", as they were called at the time.

Today, we recognise the problem which our predecessors were confronted with. We are still discussing the basis and the limits of the powers of international courts, including of the European Court of Human Rights. We still aim to attain legal certainty, to ensure legitimacy and justice, and to avoid conflicting obligations emanating from different regimes of international law.[6] But are we pursuing these aims by arguing about the *sources* of international law? The Strasbourg Court, at first sight, does not seem to do this. The Court has used language which

seems to suggest that it is not too concerned about the sources of international law. In the 2008 case of *Demir and Baykara v. Turkey*, the Court has observed that:

> "in searching for common ground among the norms of international law it [the Court] has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State."[7]

Does this mean that the Court does not distinguish between legally binding and non-binding international norms, and perhaps nor even very clearly between different sources of international law? Does the Court even recognise non-traditional sources beyond Article 38 of the ICJ Statute?

II. The Fragmentation report and the work of the ILC on the sources of international law

Statements such as the one in *Demir and Baykara* have often been understood as implying a claim of a special human rights character of the Convention which would be in tension with general international law, including with its methodological rules on sources.[8] It was this perceived tension which contributed to the decision by the International Law Commission, in 2002, to create a Study Group on the topic of "Fragmentation of International Law".

The 2006 report of this Study Group[9] frames the debate until today. As far as the European Court of Human Rights is concerned,[10] the Fragmentation report comes to the conclusion that the Strasbourg Court, when interpreting the Convention in the light of other rules of international law, has applied the customary rules on treaty interpretation as they are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[11] The 2020 report of the Steering Committee for Human Rights "on the place of the European Convention of Human Rights in the European and international legal order" has confirmed this finding.[12]

Does it follow from there that the Court is more faithful to a traditional understanding of the sources of international law than what a first impression suggests? Or does the jurisprudence of the Strasbourg Court provide innovative impulses for the doctrine of sources at the international level? The International Law Commission has in recent years addressed such questions when working on different restatements relating to the three classical sources of international law.[13] The most important reason why the ILC has worked on those sources is to provide more legal certainty with respect to the identification of international law, not only by states but also by different courts – national, regional, or universal. In the course of its work the Commission has, to a certain extent, identified the contribution of the European Court of Human Rights to the general rules on the sources of international law. In the following I will focus on the work on treaties, customary international law, and general principles of law:

III. Treaties

Regarding treaties, the clearest example of a contribution of the European Court of Human Rights to their understanding as a source of international law is its well-known jurisprudence regarding the effects of invalid reservations.[14] It is not necessary to retell this well-known development at a meeting of the Legal Advisers of the Council of Europe. A less specific contribution of the Court to treaties as a source of international law concerns the method of treaty interpretation. I also need not say very much about this aspect either because Judge Sicilianos has addressed it quite comprehensively. Let me only add the following:

One of the main reasons why the ILC has worked on treaty interpretation in recent years consists in the challenge which the European Court of Human Rights seemed to pose to the general Vienna rules on treaty interpretation.[15] Since the 1970s, the Strasbourg Court is well-known for its occasionally evolutive approach to the interpretation of Convention rights. The Court has justified this approach by referring to the specific character of the Convention as a human rights treaty.[16] The ILC has, however, indicated that evolutive approaches to treaty interpretation are neither specific to human rights treaties nor do they even constitute a separate method of treaty interpretation.[17] For example, the International Court of Justice, in the 2009 Case Concerning Navigational and Related Rights (*Costa Rica v Nicaragua)*, has applied a form of evolutive interpretation to a 19th century bilateral border treaty.[18]

Evolutive interpretation should, however, not be undertaken lightly. Other international courts and tribunals have engaged in such interpretations in varying degrees.[19] The WTO Appellate Body, for example, has remained more reluctant in that respect, for good reasons. It is however possible to say that the Strasbourg Court has contributed to establishing more legitimacy at the universal level for evolutive approaches to interpretation. The work of the ILC nevertheless suggests that evolutive approaches to treaty interpretation need to be pursued with caution. They should, as far as possible, be undertaken on the basis of a broad supportive practice of the parties to a treaty so as to ensure the necessary degree of legal certainty and legitimacy.[20]

IV. Customary international law

This brings me to the second source, customary international law. The contribution of the European Court of Human Rights to the understanding of this source is less pronounced than with respect to treaties. Neither the reports of the Special Rapporteur on Identification of customary international law,[21] nor the commentaries to the 2018 conclusions of the ILC on this topic[22] contain many references to the jurisprudence of the European Court. This may be due to the emphasis given by the Special Rapporteur, Sir Michael Wood, to the jurisprudence of the ICJ and not to any other international court or tribunal.

The Strasbourg Court, when identifying a rule of customary international law, has generally followed the methodology outlined by the International Court of Justice and by the ILC. This approach cannot be taken for granted, given the strong emphasis by some on the *opinio juris* aspect of customary international law, at the expense of the state practice element. The Strasbourg Court, when called to identify a rule of customary international law, has mostly made efforts to carefully identify the relevant state practice, particularly in its case-law relating to questions of state immunity, such as *Al-Adsani v. the United Kingdom*,[23] *Jones v. the United Kingdom*,[24] and *Cudak v. Lithuania*.[25]

It is another question how far rules of customary international law should influence the interpretation of related treaty rules. For example, the customary rules on attribution under the ILC Articles on State Responsibility may be more restrictive than the standard which the European Court uses when determining the scope of its jurisdiction under Article 1 of the Convention.[26] Although the question of fragmentation of international law does not arise in this context, the Court should further clarify, as Professor Šturma has emphasised, whether or how far its interpretation of Article 1 is inspired by a related rule of customary international law on state responsibility, and whether or how far by the object and purpose of the Convention. More generally, it is worth mentioning that former Judge Ineta Ziemele has recommended, in an excellent recent book on the European Convention and General International Law, edited by

Judge Iulia Motoc and others, that the Court improve its identification of relevant state practice when determining a rule of customary international law.[27] While this is indeed good advice, my general impression is that the Court does usually take the requirements for the identification of rules of customary international law seriously. It is thereby methodologically contributing to legal certainty.

V. General Principles of Law

General principles of law, the third source under Article 38 of the ICJ Statute, have only very exceptionally been referred to by the European Court of Human Rights.[28] This lack of practice may have to do with the fact that general principles of law in the sense of Article 38 have, so far, not even played an important role at the universal level[29] – perhaps because of their now discredited requirement that they must be "recognized by civilized nations". But this explanation for the lack of references to general principles of law in the jurisprudence of the Strasbourg Court is not sufficient:

If we look at the reasons why general principles of law were accepted, in 1920, as the third source of international law, we are seeing their function of "filling gaps" and of preventing a denial of justice.[30] The need for such a function also exists, *mutatis mutandis*, in the context of the European Convention on Human Rights. In fact, during the elaboration of the Convention in 1950, its founders envisaged the adoption of a provision according to which the supervisory organs should determine the conformity of the legislation of member states with the Convention according to "the general principles of law recognized by civilized nations referred to in Article 38 of the Permanent Court of International Justice". This proposal was ultimately *not* included in the Convention "for one reason only: We on the Committee could not contemplate the organs or the machinery doing anything else."[31]

It is well-known that the Court later did something else. In order to determine the conformity of acts of member states with the Convention, the Court inquires whether the interpretation and restrictions of Convention rights are supported by a "European consensus".[32] The European consensus is found by looking at the law in the different member states and by determining whether there is a broad commonality among them. This approach is structurally comparable to what the Advisory Committee of Jurists in 1920 expected the Permanent Court of International Justice to do when identifying general principles of law, and what the founders of the European Convention envisaged in 1950.

The ILC has only started to work on general principles of law in 2019. Can it be expected that the Commission will recognise a distinct contribution of the European Court of Human Rights in this context? This may well be the case with respect to the identification of certain such principles themselves, such as *ne ultra petitum* or the Nuremberg principles.[33] It is also possible that the Commission will emphasise the function of general principles of law for achieving a harmonised interpretation of different rules of international law, as the European Court has demonstrated in *Varnava and Others v. Turkey*[34] and *Hassan v. the United Kingdom*.[35] But there is also a certain obstacle for the ILC to rely on the methodology of the European Court when identifying a European consensus. This obstacle consists in the relatively detailed inquiry which the European Court usually undertakes when looking for a European consensus. Such a detailed inquiry may not be fully practicable at the universal level.[36]

VI. Conclusion

This brings me back to my point of departure. Does the observation of the Strasbourg Court in *Demir and Baykara* according to which "it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent state"[37] mean that the Court takes the rules on the sources of international law lightly, and that the Court mainly contributes a specialist perspective to general international law? This is certainly not the case. As far as I can see the Strasbourg Court has, to the contrary, taken the rules on the sources of international law seriously. In addition, the Court has contributed certain innovative elements which the ILC has noted and found to be generally compatible with general international law.

This leads me to the conclusion that the observation of the Court in *Demir and Baykara* should simply be read as referring to the classical rules on the sources of international law which do permit, to a certain extent, to take acts or pronouncements into account which are not binding as such. The interpretation of treaties may be influenced by the subsequent conduct of the parties and by recommendations of treaty bodies, the identification of customary international law requires looking at state practice, and general principles of law may derive from domestic legislation. All these acts or pronouncements are not binding as such. The International Court of Justice, by recognising, in the Diallo case, "that it should ascribe great weight to the interpretation adopted by" the Human Rights Committee, has adopted a similar approach.[38] If it is understood in this sense, the European Court is playing the role of a constructive stakeholder of general international law. To take such acts or pronouncements into account thus does not mean that the Strasbourg Court does not, or should not, distinguish between hard law and soft law, as former Judge Angelika Nußberger has persuasively explained in the book edited by Judge Motoc.[39]

However, and permit me to end on a cautious note, this conclusion should not be a reason for complacency. The rules on the sources of international law represent a never-ending challenge. The character of this challenge becomes clear if one looks back, one hundred years ago, to the reasons why these rules, or categories, were formulated. They were not merely formulated to provide a point of departure for the teaching of law students. They were rather formulated for the purpose of establishing, and to drawing limits to, the power of a court to declare what the law is.[40] This concern for legal certainty and for the sustained legitimacy of international courts is a primary reason why the ILC, after Fragmentation report of its Study Group, has embarked on restatements of the rules on the sources of international law. These restatements have been undertaken mostly by comparing the methodological approaches of different international courts and tribunals.

The European Court of Human Rights has so far played a role which is sensitive to the basic requirements of general international law, as well as moderately innovative. I suspect that the Court has maintained itself relatively well against certain challenges, including those which have been mounted in the context of the Interlaken process since 2010,[41] not least because it has been respectful of the methodological rules regarding the sources of international law. It is true that these rules do not place strict limits on the competence of the Court to pronounce the law. But they do provide standards for arriving at, and explaining, decisions, particularly when these decisions can be perceived as being innovative.[42] The rules regarding the sources of international law thus contribute to legal certainty and to the accountability of the European Court of Human Rights and other international courts.[43]

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[1] See Draft Statute, as contained in Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee June 16th to July 24th, 1920, with Annexes* (The Hague: Van Langenhuysen, 1920), Annex I, pp. 698-746.

[2] See Article 35 of the Draft Statute, ibid. at pp. 730-731.

[3] Ibid., pp. 306, 310-311; 318-319; 322-325.

[4] Ibid., pp. 308-310; 317-318.

[5] Ibid., pp. 730-731; Pellet/Müller, in Zimmermann/Tams, The Statute of the ICJ – A Commentary, 3rd ed. 2019, Art. 38, paras 17-41.

[6] Council of Europe, Committee of Ministers, Steering Committee for Human Rights (CDDH) (2020), "Report on the Place of the European Convention on Human Rights in the European and International Legal Order", Document CM(2020)2, p. 6; today, the need to "avoid conflicting obligations emanating from different regimes of international law" has become part of the list, ibid.

[7] ECtHR, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 78, 12 November 2008.

[8] See also ECtHR, *Ireland v. the United Kingdom*, no. 5310/71, § 239, 18 January 1978; ECtHR, *Loizidou v. Turkey* (Preliminary Objections), no. 15318/89, § 70, 23 March 1995; Schabas W. A. (2015), *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, pp. 640, 735.

[9] ILC (2006), "Report of the Study Group of the International Law Commission on Fragmentation of International Law, finalized by Martti Koskenniemi", UN Doc A/CN.4/L.682.

[10] The report is based on a multitude of references to the Strasbourg court, see, e.g., ibid., pp. 33-34 at paras 53-54 (on reservations to treaties); pp. 41-42 at paras 71 ff. and pp. 50-51 at paras 90-94, p. 55 at para. 101 (*on lex specialis*); p. 69 paras 130-131 (on teleological interpretation); pp. 86-87 at paras 161-164 and p. 92 para. 174 note 231 (on special regimes); pp. 126-127 at paras 246-249 (on *lex posterior*); pp. 187-188 at paras 372-373 (on *jus cogens*); pp. 219-221 at paras 435-438 (on systemic integration).

[11] C.f. Report of the ILC Study Group on Fragmentation (n 9), p. 92, para. 174 and p. 219, para. 435.

[12] CDDH Report 2020 (n. 6), pp. 13-14; however, the report also provides a number of examples of the Court emphasizing the special character of the Convention as a human rights treaty.

[13] ILC (2018), "Report of the International Law Commission on the Work of its seventieth Session", UN Doc. A/73/10, ch. IV (on subsequent agreements and subsequent practice in relation to the interpretation of treaties), pp. 11-116, and ch. V (on identification of customary international law), pp. 117-156; ILC (2019), "Report of the International Law Commission on the Work of its seventy-first Session", UN Doc. A/74/10, ch. IX (on general principles of law), pp. 329-339.

[14] ECtHR, *Belilos v. Switzerland*, no. 10328/83, §§ 50 ff., 29 April 1988; *Loizidou v. Turkey* (n 8), §§ 70 ff.; ILC (2011), "Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission 2011* vol. II part two, at pp. 229-231 (commentary to guideline 3.1.5.6).

[15] ILC Report 2018 (n 13), ch. IV, commentary to conclusion 8, p. 66, para. 7 and p. 68, para. 14; Nolte G. (2008), "Treaties over Time in Particular: Subsequent Agreement and Practice", UN Doc. A/63/10, Annex I, p. 158, para. 35; see also CDDH Report (n 6) 2020, pp. 6, 14 and 17.

[16] See, e.g., ECtHR, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 138, 8 November 2016; ECtHR, *Biao v. Denmark* [GC], no. 38590/10, § 131, 24 May 2016.

[17] C.f. ILC Report 2018 (n 13), ch IV, commentary to conclusion 8, at pp. 66-67, paras 8, 9 and at p. 68, para. 14; see also CDDH Report 2020 (n 6), p. 19 f.

[18] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgement) [2009] ICJ Rep 213, pp. 242-244, paras. 64-70.

[19] ILC Report 2018 (n 13), ch IV, commentary to conclusion 8, at pp. 65-66, para 7.

[20] ILC Report 2018 (n 13), ch IV, commentary to conclusion 8, p. 67 at para. 10; see also commentary to conclusion 7, p. 63 at para. 37.

[21] Wood M. (2013), "First Report on Identification of Customary International Law", UN Doc. A/CN.4/663; (2014);"Second Report on Identification of Customary International Law", UN Doc. A/CN.4/672; (2015) "Third Report on Identification of Customary International Law", UN Doc. A/CN.4/682; (2016) "Fourth Report on Identification of Customary International Law", UN Doc. A/CN.4/695; (2018) "Fifth Report on Identification of Customary International Law", UN Doc. A/CN.4/717.

[22] ILC Report 2018 (n 13), ch V, pp. 119-156.

[23] ECtHR, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 60-66, 21 November 2001.

[24] ECtHR, *Jones v. the United Kingdom*, nos. 34356/06 and 40528/06, §§ 110-215, 14 January 2014.

[25] ECtHR, *Cudak v. Lithuania* [GC], no. 15869/02, §§ 29-33 and 64-69, 23 March 2010; the ICJ, for its part, has relied on the Strasbourg Court when identifying a rule of customary international law in *Jurisdictional Immunities of the State* (*Germany v. Italy*) (Judgment) [2012] ICJ Rep 99, para. 78; see also para. 90.

[26] ECtHR, *Catan and Others v. Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, §§ 102-120, 19 October 2012; CDDH Report 2020 (n 6), pp. 32-43.

[27] Ziemele I. (2018), "European Consensus and International Law", in van Aaken A. and Motoc I. (eds.), *The European Convention on Human Rights and General International Law*, Oxford University Press, Oxford, p. 36.

[28] Cf. ECtHR, *Golder v. the United Kingdom*, no. 4451/70, § 35, 21 February 1975: "Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of 'any relevant rules of international law applicable in the relations between the parties'. Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5)." Apart from this decision, reference has been made to "general principles of law recognised by civilised nations" mainly when interpreting Article 7 (2) of the Convention; see e.g. ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §§ 66, 72, 18 July 2013.

[29] See *Statement of H.E. Abdulqawi Ahmed Yusuf, President of the International Court of Justice before the Sixth Committee of the UN General Assembly*, New York, November 2019, available at http://statements.unmeetings.org/media2/23328836/president-icj-e.pdf, para. 27: "Neither the PCIJ nor the ICJ has ever explicitly based a decision on a rule or principle derived from the "general principles of law recognized by civilized nations." The only explicit reference to Article 38 (1) c of the ICJ-Statute has been made in the controversial *South West Africa, Second Phase, Judgment*, I.C.J. Reports 1966, p. 6 at p. 47 para. 88.

[30] See the debate on this issue in the Advisory Committee of Jurists (n 1), particularly at pp. 307-319.

[31] Special Rapporteur Sir David Maxwell-Fyfe, Plenary Sitting on 25 August 1950, *Second Session of the Consultative Assembly*, contained in: 'References to the notion of the "general principles of law recognised by the civilised nations" as contained in the travaux préparatoires of the Convention', CDH(74)37, p. 16 (available at: https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-PGD-CDH(74)37-BIL1678846.pdf); also in *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, Volume VI, Consultative Assembly*, Martinus Nijhoff Publishers 1985, p. 78.

[32] *Magyar Helsinki Bizottság v. Hungary* (n 16), § 148; see also Ziemele (n 27).

[33] Article 7 of the Convention, after all, provides a reference for the latter as being a general principle of law.

[34] ECtHR, *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al., § 185, 18 September 2009.

[35] ECtHR, *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014; CDDH Report 2020 (n 6), p. 16.

[36] CDDH Report 2020 (n 6), p. 21: "based on a comprehensive analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law"; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep p. 43, para. 119.

[37] See n 7.

[38] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, para. 66; the ICJ had already earlier confirmed that treaty rules may be "open to adapt to emerging norms of international law", *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) [1997] ICJ Rep 7, para. 111.

[39] Nußberger A. (2018), "Hard Law or Soft law – Does It Matter?: Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR", in van Aaken A. and Motoc I. (eds.) (n 27), pp. 48-52 referring to *National Union of Rail, Maritime and Transport Workers v UK* App no 31045/10 (ECtHR, 8 April 2014).

[40] See n 4; the same sentiment was expressed during the elaboration of the European Convention in 1950 by Mr. Chaumont when he said that "the Court is not intended to create new law *ex cathedra*", CDH(74)37 (n 31), p. 10.

[41] CDDH Report 2020 (n 6), p. 9.

[42] Ziemele (n 27), pp. 23-40.

[43] CDDH Report 2020 (n 6), p. 21, para. 96.